

## Residence Requirements for Welfare and Voting: A Post-Mortem

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### I. INTRODUCTION

In the wake of *Shapiro v. Thompson*<sup>1</sup>—residence requirements for migrant welfare recipients are unconstitutional—Professor Margaret Rosenheim wrote, “*Shapiro* stands as a high-water mark of judicial indignation over a discrimination which betrays the meanness and inhumanity of public assistance. The traditions of six hundred years have been dealt a mortal blow.”<sup>2</sup> Those traditions were rooted in pre-Elizabethan law and custom, in colonial enactments,<sup>3</sup> and at the time of the decision were expressed in the statutes of forty or more States.<sup>4</sup> “Judicial indignation” did not, therefore, represent the “moral” sense of the American people on which activists customarily rely for judicial revision of the Constitution,<sup>5</sup> but rather, as Chief Justice Hughes had advised a newcomer, Justice Douglas, it constituted an “emotional” reaction

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1. 394 U.S. 618 (1969) (Warren, C.J., Black & Harlan, JJ., dissenting).

2. Rosenheim, *Shapiro v. Thompson: “The Beggars Are Coming To Town,”* 1969 SUP. CT. REV. 303, 345–46. Chief Justice Marshall said with respect to the slave trade that “this Court must not yield to feelings which might seduce it from the path of duty. . . .” *The Antelope*, 23 U.S. (10 Wheat.) 66, 114 (1825). Justice Holmes wrote that “nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law.” O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 171–72 (1920).

3. The “English Law of Settlement and Removal of 1662 . . . and the earlier Elizabethan Poor Law of 1601 were the models adopted by the American Colonies.” *Shapiro v. Thompson*, 394 U.S. 618, 628 n.7 (1969). For an instructive panorama of English, colonial and early State laws, with copious citations to the literature, see Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 CALIF. L. REV. 175 (1955).

4. *Shapiro v. Thompson*, 394 U.S. 618, 639–40, 676 n.36 (1969). The Court noted that “[i]n the Congress, sponsors of federal legislation to eliminate all residence requirements have been consistently opposed by representatives of state and local welfare agencies who have stressed the fears of the States that elimination of the requirements would result in a heavy influx of individuals into States providing the most generous benefits.” *Id.* at 628. Chief Justice Warren alluded to “the apprehensions of many States that an increase in benefits without minimal residence requirements would result in an inability to provide an adequate welfare system. . . .” *Id.* at 651 (dissenting; Black & Harlan, JJ., concurring). Justice Harlan noted that “a previous Congress had already enacted a one-year residence requirement with respect to aid for dependent children in the District of Columbia.” *Id.* at 664. Under its “plenary” power over commerce, *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 425 (1946), Congress should have the last word. Once more the Court rushed in where Congress had refrained, branding as an “unreasonable burden” on free travel a practice to which the English and American people had been wedded for 600 years! 394 U.S. 618, 629 (1969).

5. For citations to and a critique of such views see Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978). On the other hand, Justice Holmes stated that “this Court always had disavowed the right to intrude its judgment upon questions of policy or morals.” *Hammer v. Dagenhart*, 247 U.S. 251, 280 (1918) (dissenting opinion; Brandeis, Clark & McKenna, JJ., concurring). He was anticipated by Madison: “[Q]uestions relating to the general welfare being questions of policy and expediency, are unsuited to judicial cognizance and decision.” Veto of Internal Improvement Bill (1817), 1 J.D. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 584, 585 (1897).

for which the "rational part of us supplies the reasons for supporting our predilections." In Douglas' homelier terms, "the 'gut' reaction of a judge at the level of constitutional adjudication . . . [was] the main ingredient of his decision."<sup>6</sup> Are the "gut reactions" of the Justices an adequate basis for setting aside the continuing objections of the American people to contributing to the immediate support of migrants?

"We do not doubt," said Justice Brennan, "that the one-year waiting period is well-suited to discourage the influx of poor families in need of assistance." But the "nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land. . . ."<sup>7</sup> Be that assumed, and it is a manifest *non sequitur* to insist that a right to travel entitles a migrant to support at the terminus.<sup>8</sup> One recalls Justice Holmes' analogous "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman,"<sup>9</sup> an apothegm that is peculiarly relevant because the "right to travel" was for 600 years limited by a sovereign right to exclude paupers.<sup>10</sup>

6. W. DOUGLAS, *THE COURT YEARS 1939-1975*, at 8 (1981). See note 197 *infra*. See also Kurland quotation, note 198 *infra*.

7. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969).

8. To be sure, the Court does not baldly formulate its conclusions in this manner. It argues that a State may not "chill the assertion of constitutional rights by penalizing those who choose to exercise them." *Id.* at 631. To penalize is to impose a penalty, and a penalty imposes a "loss or disadvantage." OXFORD UNIVERSAL DICTIONARY 1462 (3d ed. 1955). Thus the Court tacitly premises that the traveler is *entitled* to support at his destination merely because he must be "free to travel." 394 U.S. 618, 629 (1969). To deny this is to impose a "disadvantage." It is "unreasonable" to brand as an "unreasonable burden" on the right to travel, *id.*, a practice that has been embodied in law for 600 years. See note 10 *infra*.

Another branch of *Shapiro* relies on the equal protection clause: "any classification which serves to penalize the exercise" of the right to travel is unconstitutional "unless shown to be necessary to promote a compelling governmental interest." 394 U.S. 618, 634 (1969) (emphasis added). Again this postulates that a migrant has a right to support because it is given a resident. The equal protection argument is discussed in text accompanying notes 153-71 *infra*. Here it may be noted, as Chief Justice Warren pointed out, that many States were apprehensive "that an increase in benefits without minimal residence requirements would result in an inability to provide an adequate welfare system." *Id.* at 651.

Opposing President Reagan's idea of "making welfare a state responsibility," Governor Lee S. Dreyfus of Wisconsin "warned that states 'that try to do a better job' in their welfare programs would suffer a flood of poor migrants." N.Y. Times, May 17, 1981, at 32, col. 1. The other side of the coin is illuminated by the Puerto Rican Commissioner's protest that Reagan's proposed cutbacks would "send a wave of up to 500,000 people to the United States mainland," N.Y. Times, March 12, 1981, at 1, col. 5, who would, of course, look to the given State for support, as when a wave of Cuban refugees recently descended on Florida. Of course, a State may abandon its welfare system and thus obviate the discriminatory classification, but what is this but coercion to accept a migrant's "right to support," conjured up by the Court only yesterday.

9. *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).

10. "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it. . . ." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922). "A procedure customarily employed, long before the Revolution, . . . and generally adopted by the States . . . cannot be deemed inconsistent with due process of law. . . ." *Ownbey v. Morgan*, 256 U.S. 94, 111 (1921). *Schick v. Reed*, 419 U.S. 256, 261-62 (1974): "At the time of the drafting and adoption of our Constitution it was considered elementary that the prerogative of the English Crown could be exercised upon conditions. . . . The history of our executive pardoning power reveals a consistent pattern of adherence to the English common law practice." *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968): "So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established common-law practice." See also *United States v. Wong Kim Ark*, 169 U.S. 649, 658 (1898). By the Court's own criteria, its overturn of the 600 year old practice in *Shapiro* is indefensible.

A luminous study by a migrant sympathizer, Professor Zechariah Chafee, asks, "Should a law enacted by a sovereign State [one of forty or more] be nullified unless it contravenes a specific clause of the Constitution?"<sup>11</sup> "[T]here is," he states, "a queer uncertainty about what clause in the Constitution establishes this right" to travel.<sup>12</sup> Justice Harlan regarded it as "nebulous";<sup>13</sup> and the *Shapiro* majority noted that the "'right finds no explicit mention in the Constitution,'" but found "no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision," content that it "has been firmly established"<sup>14</sup>—by the Court, a judicial Cloud Nine unencumbered by constitutional moorings. Such nebulosity underlines the admonition in John Adams' 1780 Massachusetts Constitution: "A frequent recurrence to the fundamental principles of the constitution . . . [is] absolutely necessary to preserve the advantages of liberty and to maintain a free government,"<sup>15</sup> particularly when the Court, as Justice Harlan charges, has engaged in "contriving new constitutional principles."<sup>16</sup>

Before searching for the "right to travel" on which *Shapiro* rests, it will be instructive to note a few historical aspects of English and colonial treatment of welfare for migrants that represent an "established" qualification of the right to travel and mirror present-day concerns. To Rosenheim, the "durational residence requirement" had "seemed to be permanent"; derived from the Elizabethan Poor Law, it "had been part of the states' poor relief laws from the beginning."<sup>17</sup> That Poor Law was grounded on three principles: (1) local responsibility, (2) settlement (domicile) and removal (of migrants), and (3) primary family responsibility, a trinity which, Professor Stefan Riesenfeld observed, "influenced colonial development profoundly."<sup>18</sup> Imposition of local responsibility resulted in "vigorous attempts to reduce the relief burden as much as possible," in large part by preventing "strangers" from adding to the burden of relief.<sup>19</sup> For example, in 1629, the Judges of Assize at Lancaster entered an order reciting that whereas the Manchester inhabitants

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11. Z. CHAFEE, *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787*, at 190 (1956) [hereinafter cited as CHAFEE].

12. *Id.* at 188. And he concludes, "Freedom of Movement is a valuable human right, but is it in the Constitution? Only part way. Freedom to live where one pleases inside the United States is in it somewhere, as the Supreme Court has established. . . ." *Id.* at 209. "The 'right to travel' from state to state has been a favorite of both the Warren and Burger Courts. The Constitution makes no mention of any such right. By now we know that that cannot be determinative, but we are entitled to some sort of explanation of why the right is appropriately attributable. In recent years the Court has been almost smug in its refusal to provide one." J. ELY, *DEMOCRACY AND DISTRUST* 177 (1980).

13. *United States v. Guest*, 383 U.S. 745, 771 (1966) (concurring in part and dissenting in part).

14. *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (quoting *United States v. Guest*, 383 U.S. 745, 758 (1966)).

15. Article XVIII, 1 B. POORE, *FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS* 959 (1878). For similar provisions, see *New Hampshire* (1784), Article XXXVIII, *id.* at 1283; *North Carolina* (1776), Article XXI, *id.* at 1410; *Pennsylvania* (1776), Article XIV, *id.* at 1542; *Vermont* (1777), Article XVI, *id.* at 1860.

16. *Shapiro v. Thompson*, 394 U.S. 618, 677 (1969).

17. Rosenheim, *Shapiro v. Thompson*: "The Beggars Are Coming to Town," 1969 SUP. CT. REV. 303, 304.

18. Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 CALIF. L. REV. 175, 178 (1955).

19. *Id.* at 181.

from time to time have made great provisions for the poor of said town which good actions and the want of execution of some convenient course to restrain poor people, that come from several places to inhabit and in short time chargeable unto the said town, has been such a motive and invitation of strangers that are poor and weak in estate as the town is at this present so pestered and overburdened as the native poor is wronged . . . .<sup>20</sup>

Consequently the court restrained "persons from settling in the town without sufficient security to prevent their becoming public charges."<sup>21</sup>

"It was exactly this state of affairs," wrote Riesenfeld, "which the colonists transplanted to the new country."<sup>22</sup> Thus, a Massachusetts Bay statute of 1665 provided that "all such persons as shall be brought into any such town without the consent and allowance of the prudential men, shall not be chargeable to the town where they dwell, but, if necessity shall require, shall be relieved and maintained by those that were the cause of their coming . . . ."<sup>23</sup> Similarly, the 1655 New Haven Code "ordered that any person who had lived for a whole year . . . in any plantation should be counted as an inhabitant of that plantation and neither be sent back nor be chargeable to any other plantation," and that "nobody should be received as a new settler without consent of the majority of the freemen."<sup>24</sup> There is no need to recapitulate numerous other examples collated by Riesenfeld; as Jacobus tenBroek wrote, Riesenfeld showed how the English Poor Law system, "step by step, settlement by settlement, and colony by colony," became "deeply imbedded in community life and legal order."<sup>25</sup>

Very early the constitutional validity of State law reflecting these practices was recognized by the Court. In *New York v. Miln* (1837)<sup>26</sup> the issue was whether the commerce power overrode the New York statute. The Court held that "the object of the legislation was, to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries, or from other of the states. . . . [T]he necessary steps might be taken . . . to prevent them from becoming chargeable as paupers."<sup>27</sup> Alluding to New York's purpose to "prevent her citizens from being oppressed by the support of multitudes of poor persons, who come from foreign countries without possessing the means of supporting themselves," the Court stated that "[t]here can be no mode in which the power to regulate internal police could be more appropriately exercised";<sup>28</sup> and that since the power "undeniably existed at the formation of the Constitution," it "was [not] taken from

20. *Id.* at 194.

21. *Id.* at 191.

22. *Id.* at 198.

23. *Id.* at 207.

24. *Id.* at 211.

25. TenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status*, 16 STAN. L. REV. 257, 291 (1964). In the eighteenth century, Riesenfeld found, "[r]emoval provisions specifically applying to unsettled paupers became a ubiquitous feature of the poor laws." Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 CALIF. L. REV. 175, 224 (1955).

26. 36 U.S. (11 Pet.) 102 (1837).

27. *Id.* at 133.

28. *Id.* at 141.

the states" by the commerce power.<sup>29</sup> Although Justice Story filed a dissenting opinion, he "admitted" that the States "have a right to pass poor laws, and laws to prevent the introduction of paupers. . . ."<sup>30</sup> As a participant in *Gibbons v. Ogden*,<sup>31</sup> who now cited the case for the exclusive commerce power of Congress,<sup>32</sup> Story was eminently qualified to affirm that the said power left the right to exclude paupers untouched.

These views were reiterated in seriatim opinions in the 1849 *Passenger Cases*,<sup>33</sup> all being in agreement as to the right to exclude paupers. Justice Woodbury observed that "[s]uch legislation commenced in Massachusetts early after our ancestors arrived at Plymouth. It first empowered the removal of foreign paupers"; and he cited Justice Story's "admission" that States "have a right . . . to prevent the introduction of paupers into the States . . . ."<sup>34</sup> Justice McLean referred to the "unquestionable power in the State to protect itself from foreign paupers and other persons who would be a public charge."<sup>35</sup> Justice Wayne averred that paupers are "not within the regulating power which the United States have over commerce. Paupers . . . never have been subjects of rightful national intercourse. . . . The States may . . . prevent them from entering their territories, may carry them out or drive them off."<sup>36</sup> Justice Grier stated that "[t]his right of the States has its foundation in the sacred law of self-defense, which no power granted to Congress can restrain or annul. It is admitted by all . . . ."<sup>37</sup> And Chief Justice Taney rejected the notion that a "mass of pauperism and vice may be poured out upon the shores of a State in opposition to its laws, and the State authorities are not permitted to resist or prevent it," for he too regarded it as "a power of self-preservation," that "was never intended to be surrendered."<sup>38</sup> These principles were reaffirmed in *Railroad Co. v. Husen* (1877).<sup>39</sup>

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29. *Id.* at 132. The Court cited *Federalist No. 45*: "[T]he powers reserved to the several states, will extend to all the objects, which in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the state." *Id.* at 133. Madison stated in *Federalist No. 14*, the Government's "jurisdiction is limited to certain *enumerated* objects [e.g., war and treaty making], which concern all the members of the republic, but which are not to be attained by the separate provisions of any." THE FEDERALIST No. 14, at 82 (J. Madison) (Mod. Lib. ed. 1937) (emphasis added).

30. 36 U.S. (11 Pet.) 102, 156 (1837).

31. 22 U.S. (9 Wheat.) 1 (1824).

32. 36 U.S. (11 Pet.) 102, 155 (1837). Story later repeated, "We entertain no doubt whatever that the States, in virtue of their general police power" may exclude or remove "vagabonds and paupers." *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 625 (1842).

33. 48 U.S. (7 How.) 283 (1849).

34. *Id.* at 519, 526.

35. *Id.* at 402.

36. *Id.* at 426. Wayne likewise stated, "The States have also reserved the police right to turn off from their territories paupers. . . ." *Id.* at 425.

37. *Id.* at 457. Justice Catron concurred with Grier. *Id.* at 464.

38. *Id.* at 472, 470. Justices Daniels and Nelson concurred with Taney. *Id.* at 515, 518. *Shapiro v. Thompson* quotes from this opinion of Taney:

For all the great purposes for which the Federal Government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

394 U.S. 618, 630 (1969). But it ignores Taney's qualification which is decisive of the *Shapiro* issue: the States reserved the right to exclude migrant paupers.

39. 95 U.S. 465 (1877).

We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may properly be denominated police power. . . . Under it a State may legislate to . . . exclude from its limits convicts, paupers . . . and persons likely to become a public charge . . . a right founded as intimated in *The Passenger Cases* . . . by Mr. Justice Greer [sic] [and Chief Justice Taney], in the sacred law of self-defense.<sup>40</sup>

A word, too, about what Justice Rutledge reminded us Chief Justice Marshall declared was "a grant to Congress of plenary and supreme authority" over commerce.<sup>41</sup> By the Act of March 3, 1891, Congress mandated the exclusion of "paupers or persons likely to become a public charge."<sup>42</sup> The Act was challenged in the *Japanese Immigrant Case* (1903)<sup>43</sup> as in violation of a treaty with Japan, which called for "full liberty to enter, travel or reside . . . but not to affect the laws . . . with regard to . . . police and public security . . . ."<sup>44</sup> Justice Harlan the elder held that the treaty "expressly excepts from its operation any ordinance or regulation relating to 'police and public security.' A statute excluding paupers or persons likely to become a public charge is manifestly one of police and public security,"<sup>45</sup> precisely as the Court had held with respect to cognate State exclusions.

In sum, the right of a State to exclude paupers in the exercise of its police power was repeatedly recognized by the Court and was not questioned until 1941 in *Edwards v. California*.<sup>46</sup> There Justice Byrnes, referring to the "contention that the limitation upon State power to interfere with the interstate transportation of persons is subject to an exception in the case of 'paupers'," remarked of earlier judicial references to such migrants as a "moral pestilence" that this "language has been casually repeated in numerous later cases up to the turn of the century," and then he even more casually overruled the earlier uninterrupted string of cases on the ground that "it will [not] now be seriously contended that because a person is without employment and without funds he constitutes a 'moral pestilence.'"<sup>47</sup> Indigence need not be regarded as a "moral pestilence" in order to justify the rejection by forty States of the burden of supporting migrants. Compare Byrnes' indignation with Justice Story's application in a similar case of long "established" canons of construction: "[S]uch long acquiescence in it, such contemporaneous construction of it, and such extensive and uniform recognition [and here embodiment in long-standing State law] of it . . . would . . . entitle the question

40. *Id.* at 470-71.

41. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423 (1946). Justice Frankfurter considered that under the commerce clause jurisdiction, "judgments denying power to the States are subject to Congressional revision." A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 30 (1978).

42. Ch. 551, § 1, 26 Stat. 1084 (1891) (the exclusion of paupers appears in the current statutes at 8 U.S.C. § 1182 (1976)).

43. 189 U.S. 86 (1903).

44. *Id.* at 96.

45. *Id.* at 97. Similar statutes went unquestioned in *Gegiow v. Uhl*, 239 U.S. 3 (1915), per Justice Holmes.

See also note 4 *supra*.

46. 314 U.S. 160 (1941).

47. *Id.* at 176-77.

to be considered at rest."<sup>48</sup> This is not to exalt stare decisis—though Justices Thurgood Marshall and Brennan cried out in 1973 at a fancied departure from the “well-established principles” of *Shapiro v. Thompson* (1969)<sup>49</sup>—but rather to ask whether present-day Justices have been given a dazzling revelation that was denied to Justices who were closer in time to the Founders and whose views reflect the “600 year tradition.” Justice Jackson reminded the Brethren, “We are not final because we are infallible, but we are infallible only because we are final.”<sup>50</sup>

More is involved, however, than unbroken “practice.” That long usage gives meaning to the terms the Framers employed. Such terms, the Court held, must be interpreted with reference “to British institutions as they were when the instrument was framed and adopted.”<sup>51</sup> Whatever the scope of “commerce” and “liberty,” they cannot comprehend what English and colonial law and practice so plainly excluded. Who would have maintained in 1787 that since “commerce” and “liberty,”<sup>52</sup> comprehended the “right to travel,” they included an indigent’s right to be supported at his destination? Of those terms we may say, as did Chief Justice Marshall of “treason,” “It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it.”<sup>53</sup> In fact, the one time the Founders specifically dealt with the right of “ingress and regress” in the Articles of Confederation, they expressly *excepted* “paupers” therefrom,<sup>54</sup> evidencing their respect for colonial and State exclusion of indigent migrants. To read current judicial “interpretations” back into the constitutional terms is to transform the meaning they had for the Founders.<sup>55</sup> A departure from the governing principles of 1787 to “a principle never before recognized,” declared Chief Justice Marshall, “should be expressed in plain and explicit terms.”<sup>56</sup> That can hardly be claimed for a right to support that finds no mention in the constitutional text or its history.

Present-day Justices have not, however, felt constrained by historical meaning. Dissenting in a death-penalty case, Justice Douglas said, “The

48. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 621 (1842). Justice Catron said in a seriatim opinion in *The License Cases*, 46 U.S. (5 How.) 504, 607 (1847), that “[i]f long usage, general acquiescence, and the absence of complaint can settle the interpretation . . . then it should be deemed as settled in conformity with the usage by the courts.” For similar expression by Justice Holmes, see note 10 *supra*, and by Chief Justice White, see text accompanying note 106 *infra*. See also *Walz v. Tax Comm’r*, 397 U.S. 664, 678 (1970).

49. *Vlandis v. Kline*, 412 U.S. 441, 455 (1973) (concurring opinion).

50. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (concurring opinion).

51. *Ex parte Grossman*, 267 U.S. 87, 108–09 (1925). For example, “the word ‘jury’ and the words ‘trial by jury’ were placed in the Constitution . . . with reference to the meaning affixed to them in the law as it was in this country and in England at the adoption of that instrument. . . .” *Thompson v. Utah*, 170 U.S. 343, 350 (1898). See also R. BERGER, *GOVERNMENT BY JUDICIARY* 403 (1977).

52. In *Kent v. Dulles*, 357 U.S. 116, 125 (1958), the Court held that “[t]he right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without due process of law under the Fifth Amendment.”

53. *United States v. Burr*, 25 F. Cas. 55, 159 (C.C.Va. 1807) (No. 14,693).

54. See text accompanying note 83 *infra*.

55. See Justice Black quotation at text accompanying note 64 *infra*.

56. *United States v. Burr*, 25 F. Cas. 55, 165 (C.C.Va. 1807) (No. 14,693). See also *Pierson v. Ray*, 386 U.S. 547 (1967).

Court has history on its side—but history alone.”<sup>57</sup> Justice Brennan even more flatly stated that history was not binding on the Court.<sup>58</sup> On the other hand, Chief Justice Taney emphasized that “[i]f in this court we are at liberty to give old words new meanings when we find them in the Constitution, there is no power which may not, by this mode of construction, be conferred on the general government and denied to the States.”<sup>59</sup> That is precisely what activists unabashedly advocate; but let us be clear that it cannot be rooted in constitutional warrant but rather represents a claim to judicial power to revise the Constitution.<sup>60</sup>

Consider how Justice Byrnes, in *Edwards v. California*,<sup>61</sup> the first interstate indigent nonresident case, replied to the argument that such State restraints enjoy “a firm basis in English and American history”: “[T]he theory of the Elizabethan poor laws no longer fits the facts” in light of “a growing recognition that in an industrial society the task of providing assistance to the needy has ceased to be local in character.”<sup>62</sup> That “recognition” had not, however, prompted the forty States to repeal their residence requirements, and therefore merely represented the moral sentiments of the Court, but another example of what Justice Douglas described as “the evolving gloss of civilized standards which this Court . . . *has been reading into*” the Constitution.<sup>63</sup> In a similar case Justice Black accused the Court of giving a constitu-

57. *McGautha v. California*, 402 U.S. 183, 241 (1971) (dissenting opinion). On the other hand, the Court, per Justice Harlan, held that “it requires a strong showing to upset this settled practice of the Nation on constitutional grounds.” *Id.* at 203.

58. *Oregon v. Mitchell*, 400 U.S. 112, 251 (1970) (dissenting and concurring in part): “We could not accept [Justice Harlan’s] thesis even if it were supported by historical evidence far stronger than anything adduced here today.”

59. *The Passenger Cases*, 48 U.S. (7 How.) 283, 478 (1849).

60. Professor Louis Lusky pays tribute to “the Court’s new and grander conception” of its role, its “assertion of power to revise the Constitution, bypassing the cumbersome amendment procedure prescribed by article V.” Lusky, Book Review, 6 *HASTINGS CONST. L.Q.* 403, 406, 408 (1979). On such reasoning a break-in through a window may be defended because entry through the barred door was “cumbersome.” See also text accompanying notes 199–200 *infra*.

61. 314 U.S. 160 (1941).

62. *Id.* at 174–75. Consider the reasoning of Justice Douglas in a similar case: “We agree, of course, with Mr. Justice Holmes that the Due Process clause of the Fourteenth Amendment ‘does not enact Mr. Herbert Spencer’s Social Statics’ . . . . Likewise the Equal Protection Clause is not shackled to the political theory of a particular era.” *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966). Douglas perverted Holmes’ meaning. Holmes objected to reading Spencer’s *Social Statics* into the Constitution. By parity of reasoning, Douglas should not read *his* social predilections into the clause. As Justice Harlan observed, the clause does not “rigidly impose upon America an ideology of unrestrained egalitarianism.” *Id.* at 686 (dissenting opinion). The framers left us a record of the limited scope they contemplated for equal protection. See text accompanying notes 160–66 *infra*.

When, however, a particular ruling displeased him, Douglas denounced it as “such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism.” *Maryland v. Wirtz*, 392 U.S. 183, 201 (1968) (dissenting opinion). At issue was the application of the Fair Labor Standards Act to State hospitals and schools, requiring outlays that fell far short of the burdens imposed by migrant paupers. But then Douglas stated that constitutional decision making is largely determined by the judges’ “gut reactions.” See text accompanying note 6 *supra*.

63. *McGautha v. California*, 402 U.S. 183, 241 (1971) (dissenting opinion) (emphasis added). Cf. Justice Cardozo:

The constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the People of that Commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because



tional phrase "a new meaning which it believes represents a better governmental policy."<sup>64</sup> That policy may be highly desirable and nonetheless constitute an arrant arrogation of power to amend the Constitution. Change is for the people themselves, through the machinery of article V.<sup>65</sup>

## II. THE RIGHT TO TRAVEL

Since the Court hung the indigent migrant's constitutional claim to immediate support on the right to travel, it will profit us to retrace the search for its roots, a search which perplexed Zechariah Chafee, an eminent protagonist of the right.<sup>66</sup> "Although," said Justice Stewart, "there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists."<sup>67</sup> The Justices' "recurring differences," however, render it "uncertain" that it can be located in the Constitution, where, Justice Harlan properly insisted, it "must be found."<sup>68</sup> What is in issue is the constitutional warrant for the Court's overthrow of centuries-old residence restrictions on migrant welfare, and that cannot be settled by the Court's self-serving declarations.<sup>69</sup>

### A. The Commerce Clause

The first judicial invocation in the premises of the commerce clause was that of Justice William Johnson, who held on circuit in 1823 that State seizure of a British Negro seaman who temporarily entered South Carolina offended the clause.<sup>70</sup> When the clause came before the Supreme Court in 1837, the Court held that "goods are the subject of commerce, . . . persons are not,"<sup>71</sup> a conclusion echoed about 100 years later by Justice Jackson in *Edwards v. California*: "[T]he migrations of a human being . . . do not fit easily into my notions of what is commerce."<sup>72</sup> So it seemed to the Framers for, as Chafee

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opinions may differ as to their policy of fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice. . . .

*Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

64. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 672 (1966) (dissenting opinion).

65. Time and again Justice Black hammered the point home, dismissing "rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with the duty to make those changes. . . . The Constitution makers knew the need for change and provided for it" by the amendment process of Article V. *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (Black, J., dissenting opinion).

66. See text accompanying notes 10 & 12 *supra*; text accompanying note 134 *infra*.

67. *United States v. Guest*, 383 U.S. 745, 759 (1966). *Shapiro v. Thompson* repeats that the right "has been firmly established." 394 U.S. 618, 630 (1969). The fact that the Justices cannot agree on the constitutional source of the right, note 9 *supra*, suggests that "firmly established" refers to a judicial construct rather than a constitutional right.

68. *United States v. Guest*, 383 U.S. 745, 763 (1966) (concurring and dissenting in part). Justice Douglas remarked, "[I]t is apparent that this right is not specifically granted by the Constitution." *Edwards v. California*, 314 U.S. 160, 178 (1941) (concurring opinion).

69. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695, 698.

70. *Elkinson v. Deliesseline*, 8 F. Cas. 493 (C.C.S.C. 1823) (No. 4,366).

71. *New York v. Miln*, 36 U.S. (11 Pet.) 102, 136 (1837).

72. 314 U.S. 160, 182 (1941) (concurring opinion). See also *id.* at 177 (Douglas, J., concurring opinion).

notes, "[t]hough much was said about barriers at State-lines against goods, nobody spoke of barriers against persons,"<sup>73</sup> presumably because the Framers justifiably assumed that such barriers had been razed by the "privileges and immunities" clause of article IV.<sup>74</sup> The 1837 *Miln* view, however, was apparently abandoned by the Court in *The Passenger Cases* (1849),<sup>75</sup> in which several Justices considered "transportation of passengers [to be] a part of commerce,"<sup>76</sup> but, as has been noted, all adhered to the traditional exception for paupers as an exercise of power reserved to the States. The Court eschewed reliance on the commerce clause in the much-cited *Crandall v. Nevada* (1867).<sup>77</sup> And as Chafee asked, "[A]re human beings engaged in commerce when they are not on business trips but traveling from state to state on pleasure bent or in search of new homes?"<sup>78</sup> But the commerce clause was again invoked in *Henderson v. Mayor of New York* (1875).<sup>79</sup>

### B. The "Privileges and Immunities" of Article IV

Not the least singular aspect of the Court's search for roots is its relative indifference to the "privileges and immunities" clause of article IV, section 2, although it most clearly discloses the Founders' commitment to the right of interstate travel. *Paul v. Virginia* (1868)<sup>80</sup> noted in passing that it gives citizens of States "the right of free ingress into other States,"<sup>81</sup> as *United States v. Wheeler* (1920) again recognized.<sup>82</sup> Article IV was borrowed from the antecedent article IV of the Articles of Confederation. The latter provided that

[t]he better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, *paupers . . . excepted*, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have *free ingress and regress* to and from any other state. . . .<sup>83</sup>

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73. CHAFEE, *supra* note 11, at 186. On the other hand, Charles Pinckney referred to the commerce clause as "the measure of regulating trade," 3 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 116 (1911); and Madison explained that the clause "grew out of the abuse of the power by the importing States in taxing the non-importing. . . ." *Id.* at 478. Professor Ernest Brown noted that the predominant usage of "commerce" at the adoption of the Constitution was the "exchange of merchandise." Brown, Book Review, 67 HARV. L. REV. 1439, 1448 (1954).

74. See text accompanying note 83 *infra*.

75. 48 U.S. (7 How.) 283 (1849).

76. *Id.* at 401. Apparently Justice Wayne was of the same opinion. *Id.* at 413, 426.

77. 73 U.S. (6 Wall.) 35, 43 (1867): "[I]t is not easy to maintain . . . that [the tax] violates" the commerce clause. Chief Justice Chase and Justice Clifford, concurring, rested on the clause. For further discussion, see text accompanying notes 130-40 *infra*.

78. CHAFEE, *supra* note 11, at 189.

79. 92 U.S. 259, 270 (1875); but the Court did not decide whether the States can "protect themselves against actual paupers." *Id.* at 275.

80. 75 U.S. (8 Wall.) 168 (1868).

81. *Id.* at 180.

82. 254 U.S. 281 (1920), discussed in text accompanying notes 94-96 & 105-08 *infra*.

83. *Id.* at 294 (emphasis added).

Thus "privileges and immunities" were defined to include "ingress" into a sister State, "paupers excepted."

Article IV, section 2 of the Constitution provided that "[t]he citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Justice Harlan commented that "'free ingress and regress' was eliminated . . . without discussion" because "it was so obviously an essential part of our federal structure that it was necessarily subsumed under more general clauses of the Constitution."<sup>84</sup> But where? To my mind, ingress into a sister State was implicit in "privileges and immunities." How could a citizen of one State fully enjoy the privileges of a sister State without entry therein, particularly since the prime purpose of the antecedent Articles of Confederation clause was to secure "mutual friendship and intercourse among the people of the different States in this Union . . . ."<sup>85</sup> Thirty of the fifty-five Framers had been members of the Continental Congress that drafted the Articles of Confederation,<sup>86</sup> and it is not a little remarkable that in both the Articles and the Constitution "privileges and immunities" was the subject of the same article, article IV. To borrow from Chief Justice Taney, "[T]hey ought not to be supposed to have used familiar words in a new or unusual sense."<sup>87</sup> To the contrary, the Framers presumably employed the phrase "in the sense which had been affixed to it by those from whom we borrowed it."<sup>88</sup>

Chafee's exegesis of article IV takes a restrictive view: the "trade and commerce" of the Articles of Confederation, he considers, "can be regarded as embraced" in the commerce clause,<sup>89</sup> disregarding that "commerce" had been associated with goods, not people, whereas "privileges and immunities" had specifically dealt with the "ingress" of people, going beyond "trade and commerce" to promote "mutual friendship and intercourse" among them. Chafee himself noted that commerce would not embrace the pleasure trip or search for a new home<sup>90</sup> comprehended by article IV's promotion of mutual "intercourse and friendship." No adequate explanation has been offered for abandoning the familiar ingress-egress connotation of privileges and immunities in favor of transplantation to the "commerce" or "due process" clauses

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84. *United States v. Guest*, 383 U.S. 745, 764 (1966).

85. *United States v. Wheeler*, 254 U.S. 281, 294 (1921). Chief Justice White commented on the argument that since a State may deprive its own citizens of the right of "free ingress thereto and egress therefrom" that such legislation is "incompatible with its existence as a free government and destructive of the fundamental rights of its citizens. . . ." *Id.* at 299. There is no need for such generalities because article IV of the Articles of Confederation declared that its purpose was to serve "mutual friendship and intercourse among the people of the different States" by granting "free ingress and regress to and from any other State" to "the free inhabitants of each of these States." *Id.* at 294 (emphasis added). That purpose would be defeated if any State could bar its own citizens from egress "to any other State."

86. For list of dual members, see R. BERGER, *EXECUTIVE PRIVILEGE* 127 n.51 (1974).

87. *The Passenger Cases*, 48 U.S. (7 How.) 283, 477 (1849).

88. See text accompanying note 53 *supra*. Cf. *Yates v. United States*, 354 U.S. 298, 319 (1957), in which Justice Harlan stated, "[W]e should not assume that Congress . . . used the words 'advocate' and 'teach' in their ordinary dictionary meanings when they had already been construed as terms of art carrying a special and limited connotation."

89. CHAFEE, *supra* note 11, at 185.

90. See text accompanying note 78 *supra*.

with which they had not theretofore been associated. Moreover, to locate "ingress and egress" in the commerce clause would amputate the qualifying exception for paupers, an unexplained rejection of the centuries-old English and colonial practice so carefully preserved by the Articles of Confederation.<sup>91</sup> It seems more logical, therefore, to conclude that the Framers left "ingress" and the qualifying exception for paupers where those Articles had placed them—in the privileges and immunities clause.<sup>92</sup> Throughout, the Framers sought to pare each phrase of the extensive Constitution to its barest essentials. Aware that the Continental Congress had defined privileges and immunities in terms of ingress subject to the exception for paupers, the Framers might safely rely on the familiar connotation.<sup>93</sup> This was taken for granted by the Supreme Court. In *United States v. Wheeler*<sup>94</sup> Chief Justice White repeated the statement in the *Slaughter House Cases*<sup>95</sup> respecting the article IV provisions of the Articles of Confederation and of the Constitution: "There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each."<sup>96</sup>

Before we leave article IV, it needs to be emphasized that it was framed in terms of the right the "Citizens of each State" would enjoy. Notwithstanding, the Court has persistently spoken in terms of a right of "citizens of the United States." Thus, Justice Harlan stated that "[b]ecause of the close proximity of the right of ingress and regress to the Privileges and Immunities Clause of the Articles of Confederation it has long been declared that the right is a privilege and immunity of national citizenship under the Constitution."<sup>97</sup> But the stated object of the Articles of Confederation was to promote "mutual intercourse among the people of the different states," and it accorded privileges and immunities to the "free inhabitants of *each* of these States," not to "citizens of the United States." The latter concept was yet to be born. Before the Constitution, said Chief Justice Marshall in *Gibbons v. Ogden*,<sup>98</sup> the

91. That article IV, § 2 left no room for the claim that ingress was accompanied by a right to "welfare relief" may be gathered from an early construction by Justice Bushrod Washington on circuit in *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E. Pa. 1823) (No. 3,230): "The oyster beds belonging to a State may be abundantly sufficient for the use of the citizens of that State, but might be totally exhausted if the legislature could not . . . exclude the citizens of other States from taking them. . . ." Cited in *Blake v. McClung*, 172 U.S. 239, 249–50 (1898). See also *McReady v. Virginia*, 94 U.S. 391, 394–95 (1876).

92. Cf. *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 136 (1868): "The only allusion to imposts in the Articles of Confederation is clearly limited to duties on goods imported from foreign States."

93. For example, Madison sought expressly to limit "cases and controversies" "to cases of a Judiciary Nature," but was turned down, "it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature." 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (1911). In the First Congress, Abraham Baldwin, a Framers, commenting on a proposed amendment said that such minute regulation "would have swelled [the Constitution] to the size of a folio volume." 1 ANNALS OF CONG. 581 (Gales & Seaton eds. 1836) (print bearing running title "History of Debates in Congress"). Chief Justice Taney observed, "[N]o word was unnecessarily used or needlessly added. . . . Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood." *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 571 (1840).

94. 254 U.S. 281 (1920).

95. 83 U.S. (16 Wall.) 36 (1872).

96. *United States v. Wheeler*, 254 U.S. 281, 296 (1920).

97. *United States v. Guest*, 383 U.S. 745, 764 (1966) (concurring and dissenting in part).

98. 22 U.S. (9 Wheat.) 1 (1824).

States "were sovereign, were completely independent, and were connected with each other only by a league,"<sup>99</sup> as the Articles immediately attest. Article II recited, "Each State retains its sovereignty, freedom and independence"; article III provided, "The said States hereby severally enter into a firm league of friendship with each other . . ."<sup>100</sup>

Until the Court struck out on a new path in 1941, it had adhered to the traditional view, as Justice Douglas acknowledged: "To be sure, there are expressions in the cases that this right of free movement of persons is an incident of *state* citizenship. . . ."<sup>101</sup> Thus, *Twining v. United States*<sup>102</sup> explained an early construction of article IV in terms of rights "which belong to the citizens of States as such and are under the sole care and protection of the state governments."<sup>103</sup> As late as 1921, Chief Justice White, speaking for a Court graced by Justices Holmes and Brandeis, noted that article IV of the Articles of Confederation secured uniformity "not by lodging power in Congress to deal with the subject, but, while reserving in the several States authority which they had theretofore enjoyed, yet subjecting such authority to a limitation inhibiting the power from being used to discriminate."<sup>104</sup> He went on to say that "the text of Article IV, [section] 2 of the Constitution, makes manifest that it was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate its limitations . . . ,"<sup>105</sup> including, it may be added, the "exception" for "paupers." The "continued possession by the States of the reserved power to deal with free residence, ingress and egress . . . ,"<sup>106</sup> he declared, "has been so conclusively settled as to leave no room for controversy."<sup>106</sup> And he concluded that the article IV reservation "to the several States" excluded "federal authority" except where invoked "to enforce the limitation,"<sup>107</sup> and dismissed the view that "the privilege of passing from State to State is an attribute of national citizenship."<sup>108</sup> This in a case that held United States citizenship

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99. *Id.* at 187. In later years Madison pointed out that article II "emphatically declares 'that each State retains its sovereignty freedom & independence and every power &c, which is not expressly delegated to the U.S. in Congs. assembled.'" 3 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 522 (1911). See also R. BERGER, EXECUTIVE PRIVILEGE 103-05 (1974).

100. H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 111 (7th ed. 1963).

101. *Edwards v. California*, 314 U.S. 160, 180 (1941) (concurring opinion).

102. 211 U.S. 78 (1908).

103. *Id.* at 94. Justice Bradley declared in the Slaughter-House Case, 15 F. Cas. 649, 652 (C.C.D. La. 1870) (No. 8,408), "The 'privileges and immunities' secured by the original constitution, were only such as each State gave to its own citizens." On a number of occasions, the Court emphasized that article IV did not "profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare . . . that whatever" rights it granted to them, "the same, neither more nor less, shall be the measure of the rights of citizens of other States. . . ." *Blake v. McClung*, 172 U.S. 239, 252 (1898).

104. *United States v. Wheeler*, 254 U.S. 281, 294 (1920).

105. *Id.*

106. *Id.*

107. *Id.* at 298. White emphasized that but for the prohibition against discrimination, "the entire domain of the privileges and immunities of citizens of the States . . . lay within the constitutional and legislative powers of the . . . States . . . , and without that of the Federal Government." *Id.* at 298-99.

108. *Id.* at 299.

"confers no immunity against being run out of Arizona by a mob"!<sup>109</sup> For Justice Douglas all this was of no moment because "the thrust of the *Crandall* [*v. Nevada*] case is deeper,"<sup>110</sup> preferring judicial improvisation to constitutional footing.

### C. The "Privileges or Immunities" of the Fourteenth Amendment

Before examining *Crandall*, let us consider Justice Jackson's appeal to the "privileges or immunities" of the fourteenth amendment: "No State shall . . . abridge the privileges or immunities of citizens of the United States. . . ."<sup>111</sup> Justice Jackson did not go behind what he termed "these general and abstract words"<sup>112</sup> but, he besought the Court to give them "real meaning," notwithstanding that "[f]or nearly three-quarters of a century this Court rejected every plea to the privileges and immunities clause."<sup>113</sup> The words were not, however, "general and abstract" for the Framers. In its origin the fourteenth amendment was not concerned with migrants, but with conferring on *resident* Negroes the rights secured by article IV to migrant citizens of sister States.<sup>114</sup> The terms "privileges or immunities" were not, of course, picked out of the air but were plainly borrowed from the article IV phrase. In its inception, the Civil Rights Bill of 1866, which was temporally coterminous with the fourteenth amendment, which the latter was designed to constitutionalize and place beyond danger of repeal and was in fact regarded as "identical" with the Bill,<sup>115</sup> banned "discrimination in civil rights or immunities," and went on to particularize and identify them: the right to contract, to own property and to have access to the courts.<sup>116</sup> Although the words "ingress and egress" were not mentioned, employment of the article IV phrase carried its attributes with it.<sup>117</sup> Aware, moreover, of southern restric-

109. CHAFEE, *supra* note 11, at 191. In "any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy. The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own." *Hague v. C.I.O.*, 307 U.S. 496, 511 (1939).

110. *Edwards v. California*, 314 U.S. 160, 180 (1941) (concurring opinion).

111. *Id.* at 182. Justice Stewart, on the other hand, considers that "[t]he right to travel from State to State finds constitutional protection that is quite independent of the Fourteenth Amendment." *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) (concurring opinion). But he does not identify any particular clause as source of the right. The text of the fourteenth amendment, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," poses the question whether the federal government was left free to do so. (Emphasis added.)

112. *Edwards v. California*, 314 U.S. 160, 183 (1941) (concurring opinion).

113. *Id.* at 182, 183. Chafee cautioned that "exclusive reliance on the Fourteenth Amendment leads to the unbelievable result that the Philadelphia Convention did nothing at all to preserve the vital assurance, in the Articles of Confederation of 'free ingress and regress to and from any other State.'" CHAFEE, *supra* note 11, at 191-92. In my judgment, the Founders did something by article IV. See text accompanying notes 81-88 *supra*.

114. For details see R. BERGER, *GOVERNMENT BY JUDICIARY* 41-42 (1977).

115. For citations, see *id.* at 22-23. Justice Bradley held in 1870 that "the civil rights bill was enacted at the same session, and but shortly before the presentation of the fourteenth amendment; was reported by the same committee; . . . [it] was in *pari materia*, and was probably intended to reach the same object . . . the first section of the bill covers the same ground as the fourteenth amendment. . . ." *Live Stock Dealers & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughterhouse Co.*, 15 F.Cas. 649, 655 (C.C.La. 1870) (No. 8,408).

116. The bill is quoted in R. BERGER, *GOVERNMENT BY JUDICIARY* 24 (1977).

117. For example, the ratifiers of the Constitution were frequently assured that the words "trial by jury" embraced all their attributes, such as the right to challenge jurors. *Id.* at 403. So too, the Court found that "the

tions on the mobility of the freedmen,<sup>118</sup> the framers, in the words of Senator Lyman Trumbull, chairman of the Senate Judiciary Committee and draftsman of the Bill, meant to leave them free "to go and come at pleasure,"<sup>119</sup> thus reinforcing the implications flowing from use of the article IV phraseology on which the "civil rights or immunities" of the Bill avowedly was patterned.<sup>120</sup> Nowhere in the debates of the 39th Congress is there a reference to the freedman's right to support. Rather, Thaddeus Stevens, the leader of the radical Republicans, vainly sought a homestead for the black man,<sup>121</sup> repeating in his valedictory of defeated hopes while urging adoption of the fourteenth amendment, "Forty acres of land and a hut would be of more value to him than the immediate right to vote."<sup>122</sup> A North that was loath to confiscate the land of vanquished rebels for distribution to the freedmen was little likely to welcome support of blacks who migrated to the North. Indeed, the very possibility of such migration was regarded with dismay.<sup>123</sup> Nothing is gained by invoking the words "citizen of the United States," for his rights, as Trumbull explained, were those conferred by the parallel article IV clause.<sup>124</sup> The Court itself said in 1872, comparing article IV and the fourteenth amendment, "There can be but little question that . . . the privileges and immunities intended are the same in each [case]."<sup>125</sup> Be it assumed that, as Justice Jackson said, it should be a privilege of United States citizens "to enter any State of the Union,"<sup>126</sup> the 1866 debates furnish no basis for repudiation of the established States' right to exclude indigent migrants.<sup>127</sup> It begs the question to reiterate that "[t]he constitutional right to travel from one State to

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power of inquiry . . . was regarded and employed as a necessary and appropriate attribute of the power to legislate" in England, and hence was an attribute of Congress' "legislative functions." *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

118. See CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

119. *Id.* at 475. Explaining the fourteenth amendment to the electorate in Cincinnati, Senator John Sherman said that "every body . . . should have the right to go from county to county, and from State to State. . . ." Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 77 (1949).

120. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

121. F. BRODIE, THADDEUS STEVENS: SCOURGE OF THE SOUTH 211, 303 (1959).

122. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

123. Fear that the emancipated slaves would flock North in droves alarmed the North. R. BERGER, *GOVERNMENT BY JUDICIARY* 12 (1977). Senator John Sherman of Ohio said in the Senate, "[W]e do not like Negroes. We do not disguise our dislike." Woodward, *Seeds of Failure in Radical Race Policy*, in *NEW FRONTIERS OF THE AMERICAN RECONSTRUCTION* 128 (H. Hyman ed. 1966). In an article published in *THE NATION*, August 2, 1866, Thomas G. Shearman wrote, "The members from Indiana and Southern Illinois well knew that their constituents had barely overcome their prejudices sufficiently to tolerate even the residence of negroes among them, and that any greater liberality would be highly repulsive to them. . . ." *Quoted in* 6 C. FAIRMAN, *HISTORY OF THE SUPREME COURT* 1283 n.246 (1971).

124. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). In 1871, Senator Trumbull, draftsman of the Civil Rights Bill, explained that the "privileges or immunities" clause is "a repetition of a provision [article IV] as it before existed. . . . The protection which the government affords to American citizens under the Constitution as it was originally formed is precisely the protection it now affords under the Constitution as it now exists. The fourteenth amendment has not extended the rights and privileges of citizens one iota." CONG. GLOBE, 42d Cong., 1st Sess. 576 (1871).

125. *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 75 (1872).

126. *Edwards v. California*, 314 U.S. 160, 183 (1941) (concurring opinion).

127. For that we should require, in Justice Miller's words, "language which expresses such a purpose too clearly to admit of doubt." *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 78 (1872).

another . . . has been firmly established and repeatedly recognized,"<sup>128</sup> for the States' right to exclude indigent migrants had been even more "firmly established and repeatedly recognized,"<sup>129</sup> and it had the living sanction of the people as expressed in the legislation of forty or more States.

#### D. *Crandall v. Nevada*

Chief reliance is placed by expansionist Justices on *Crandall v. Nevada* (1867).<sup>130</sup> Justice Douglas considers it decided that the right to travel is "fundamental to the national character of our Federal government";<sup>131</sup> Justice Stewart asserts that it "firmly established" the right.<sup>132</sup> It is, however, a strange case on which to erect the superstructure of no-residence-restrictions-on-welfare. The case involved a Nevada tax on any person *leaving* the State by common carrier. Confessedly it did not rest on the commerce clause as urged by Chief Justice Chase and Justice Clifford.<sup>133</sup> Instead it held that citizens must have free access to the nation's capital for federal purposes. Justice Miller, Chafee observed, "found that somewhere between the lines of the Constitution there was a right of citizens to leave a state in order to go to the national capital, although there was no evidence in the case that any stagecoach passenger was bound for Washington."<sup>134</sup> Consequently the federal access theory represents the veriest dictum, violating the canon re-emphasized by Justice Brandeis: "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"<sup>135</sup> And as Chafee points out, "Justice Miller's fanciful desire to facilitate trips to Washington would not help a Texan driving to California."<sup>136</sup>

Whatever the meaning *Crandall* holds for present innovative Justices, it did not in the eyes of the Court contemporary with it repudiate the States' right to exclude indigent migrants. In 1877 the Court declared in *Railroad Co. v. Husen*,<sup>137</sup> "We admit that the deposit in Congress of the power to regulate

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128. *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969) (concurring opinion) (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)). Chafee remarks that "[d]espite inspiring statements in all the opinions, *Edwards v. California* leaves me somewhat troubled." CHAFEE, *supra* note 11, at 191. Little wonder that he concluded, "Freedom of movement is a valuable human right, but is it in the Constitution? . . . [It] is in it somewhere, as the Supreme Court has established." *Id.* at 209 (emphasis added). Divided judicial counsels are no substitute for a constitutional grant.

129. See text accompanying notes 17-44 *supra*.

130. 73 U.S. (6 Wall.) 35 (1867).

131. *Edwards v. California*, 314 U.S. 160, 178 (1941) (concurring opinion).

132. *United States v. Guest*, 383 U.S. 745, 757 (1966).

133. Justice Miller reviewed the prior decisions and said that "in view of the principles on which those cases were decided" it was "not easy to maintain" that the tax violates the Commerce Clause. 73 U.S. (6 Wall.) 35, 43 (1867). For Clifford's insistence (joined by Chief Justice Chase) on the commerce clause, see *id.* at 49.

Justice Douglas could not "accede to the suggestion . . . that the commerce clause is the appropriate explanation of *Crandall v. Nevada*." *Edwards v. California*, 314 U.S. 160, 179 (1941) (concurring opinion).

134. CHAFEE, *supra* note 11, at 189. Justice Douglas commented, "[T]here is not a shred of evidence in the record of the *Crandall* case that the persons there involved were en route on any such mission. . . ." *Edwards v. California*, 314 U.S. 160, 178 (1941) (concurring opinion).

135. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (concurring opinion).

136. CHAFEE, *supra* note 11, at 192.

137. 95 U.S. 465 (1877).



foreign commerce and commerce among the States was not a surrender of that which may properly be denominated police power. . . . Under it a State . . . may exclude from its limits convicts, paupers . . . and persons likely to become a public charge."<sup>138</sup> And in 1873 the self-same Justice Miller who wrote the *Crandall* opinion referred to the recently adopted fourteenth amendment and said in *Bartemeyer v. Iowa*<sup>139</sup> that "the most liberal advocate of the rights conferred by that amendment have contended for nothing more than that the rights of citizens *previously existing*, and dependent wholly on State laws for their recognition, are now placed under the protection of the Federal government. . . ."<sup>140</sup> There was no "previously existing" right of an indigent migrant to support in a sister State. It is scarcely conceivable that what the commerce clause and the amendment did not accomplish was achieved by *Crandall*, which had nothing whatsoever to do with the *entry* of a migrant. The logical inference is that for the Court *Crandall* had no relevance to welfare restrictions, then and thereafter an unchallenged State's right.

### E. Due Process of Law

Justice Harlan found more "solid ground" for the right to travel in the "liberty" of which "the citizen cannot be deprived without due process of law";<sup>141</sup> but Professor Chafee noted the English pre-colonial practice of excluding migrant paupers, a recognized qualification on "freedom of movement."<sup>142</sup> Then, too, the words "due process of law," as Hamilton explained on the eve of the Convention, "have a precise technical import, and are applicable only to the process and proceedings of the courts of justice; they can never be referred to an act of the legislature."<sup>143</sup> This was an accurate summary of the preceding 400 years of English and colonial law.<sup>144</sup> The iden-

138. *Id.* at 470-71.

139. 85 U.S. (18 Wall.) 129 (1873).

140. *Id.* at 133 (emphasis added).

141. *United States v. Guest*, 383 U.S. 745, 770 (1966) (concurring and dissenting in part). See also CHAFEE, *supra* note 11, at 192. In justice to Professor Chafee, he made no comment on the historic content of due process but urged instead that the several decisions the Court had used to "safeguard" racial rights freely to choose places of residence "inside a state" be expanded to "assure the right to live in any state one desires. . . ." *Id.* at 192.

Justice Jackson remarked that the "Court has not been timorous about giving concrete meaning to such obscure and vagrant phrases as 'due process.'" *Edwards v. California*, 314 U.S. 160, 183 (1941) (concurring opinion). But the obscurity is of the Court's own making. Charles Curtis, an admirer of judicial "adaptation" of the Constitution, wrote that when the Framers put due process into the Constitution, "its meaning was as fixed and definite as the common law could make a phrase. . . . It meant a procedural due process. . . ." C. CURTIS, *REVIEW AND MAJORITY RULE IN SUPREME COURT AND SUPREME LAW* 170, 177 (E. Cahn ed. 1954). It is the Court that made due process an obscurantist phrase. R. BERGER, *GOVERNMENT BY JUDICIARY* 258-60 (1977).

142. CHAFEE, *supra* note 11, at 164. "A procedure customarily employed, long before the Revolution in . . . England, and generally adopted by the States . . . cannot be deemed inconsistent with due process of law." *Ownbey v. Morgan*, 256 U.S. 94, 111 (1921).

143. 4 THE PAPERS OF ALEXANDER HAMILTON 35 (H. Syrette & J. Cooke, eds. 1962).

144. Berger, "Law of the Land" Reconsidered, 74 NW. U. L. REV. 1 (1979). Justice Story wrote that the due process clause "in effect affirms the right of trial according to the process and proceedings of the common law." 3 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1783 (1833). In the *Japanese Immigrant Case*, 189 U.S. 86, 100 (1903), Justice Harlan referred to "the fundamental principle that inhere[s] in 'due process of law' as understood at the time of adoption of the Constitution."

tity of the due process terminology of the fifth amendment with that of the fourteenth bespeaks an identity of content.<sup>145</sup> My study of the 1866 debates convinced me that the framers viewed the words in terms of judicial proceedings,<sup>146</sup> Professor John Hart Ely arrived at the same view.<sup>147</sup> The substantive content given to the words in the 1890s in order to overturn socio-economic legislation was a feat of the wonder-working Court.<sup>148</sup> It has since cried *mea culpa*,<sup>149</sup> recalling the "era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought'. . . . That era has long ago passed into history"<sup>150</sup>—regrettably only partly. The Court has confined its abjuration to "economic" due process; substantive due process continues to be employed to overturn social legislation,<sup>151</sup> though to differentiate between "liberty and property," equally governed by "due process," requires a logic that escapes the ordinary mind, and even baffled the extraordinary mind of Judge Learned Hand.<sup>152</sup> To extract from the ban against deprivation of "liberty" without due process of law a prohibition of legislative limitations on a migrant's access to relief is to do violence to the historical meaning attached to the term due process by both the Founders and the framers of the fourteenth amendment.

### III. "EQUAL PROTECTION OF THE LAWS"

In *Shapiro v. Thompson*, the Court, Justice Harlan considered, "basically relies upon the equal protection ground."<sup>153</sup> It found that the classifica-

145. James Garfield, a framer of the fourteenth amendment, stated in 1871 that its due process clause "is copied from the Fifth Amendment"; he defined it as "an impartial trial according to the laws of the land." CONG. GLOBE, 42d Cong., 1st Sess. App. 153 (1871).

146. R. BERGER, GOVERNMENT BY JUDICIARY 201-06 (1977).

147. Ely wrote that the debates are "devoid of any reference that gives the provision more than a procedural connotation." J. ELY, DEMOCRACY AND DISTRUST 15 (1980). Wallace Mendelson stated that due process meant in the fourteenth amendment what it meant in the fifth, that "[t]o incorporate the words is to incorporate their traditional meaning, and no more, . . ." namely, "a fair hearing." Mendelson, Book Review, 6 HASTINGS CONST. L.Q. 437, 453 (1979).

148. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 415-16 (1978).

149. R. BERGER, GOVERNMENT BY JUDICIARY 258-59 (1977).

150. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

151. Ely deplores "the unfortunate resurrection" of the doctrine in *Roe v. Wade*, 410 U.S. 113 (1973), the abortion case. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 422 (1978). In the contraceptive case, *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965), Justice Douglas stated, "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems . . . or social conditions. . . . This law, however, operates directly on an intimate relation of husband and wife." As Alpheus Thomas Mason points out, the inarticulate premise is that "the Court *does sit* as a super-legislature in safeguarding the penumbral right of privacy." Mason, *The Burger Court in Historical Perspective*, 47 N.Y.-ST.B.J. 87, 89 (1975).

In one such case Justice Black declared, "By the use of the due process formula the Court does not . . . abstain from interfering with congressional policy. It actively enters that field with no standards except its own conclusion as to what is 'arbitrary' and what is 'rational.'" *Flemming v. Nestor*, 363 U.S. 603, 626 (1960) (dissenting opinion).

152. Judge Learned Hand observed that the current reading of the fifth amendment as imposing "severer restrictions as to Liberty than Property" is a "strange anomaly." "There is no constitutional basis," he declared, "for asserting a larger measure of judicial supervision over" liberty than property. L. HAND, THE BILL OF RIGHTS 50, 51 (1958).

153. *Shapiro v. Thompson*, 394 U.S. 618, 657 (1969) (dissenting opinion).

tion between residents and migrants was a violation of the equal protection clause, that "the purpose of deterring the immigration of indigents cannot serve as a justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible."<sup>154</sup> It cast the issue in moral terms: mothers who move into a State to obtain public assistance are not therefore the less deserving. That is not the issue: the issue is whether taxpayers of that State must be burdened with the cost of supporting the "deserving" migrant. As this is being written the Bahamas feel threatened by a flood of Haitian refugees that strain its financial fabric;<sup>155</sup> the deluge in 1980 of 100,000 Cubans has overtaxed the capacity of Miami to care for them.<sup>156</sup> An exclusory practice, which has the weight of 600 years of English, colonial, and continued State laws behind it, was too lightly dismissed as constitutionally "impermissible." Certainly the equal protection clause furnishes no warrant for the view that it repudiated that practice.

Recourse to the equal protection clause is a relatively recent phenomenon, not long since referred to by Justice Holmes as "the usual last resort of constitutional arguments."<sup>157</sup> With due process discredited, equal protection provided an untarnished alternative, "permit[ting] today's Justices," as Professor Herbert Packer explained, "under a different label . . . to impose their prejudices in much the same manner as the Four Horsemen once did."<sup>158</sup> But what did the words mean to the framers who employed them, the test Senator Charles Sumner, archradical of the 39th Congress, commended to the framers: "[I]f words are used which seem to have no fixed signification, we cannot err if we turn to the framers."<sup>159</sup>

154. *Id.* at 631.

155. N.Y. Times, Jan. 23, 1981, at 2. Professor Rosenheim wrote, "Immigration of low-income groups produces great strains on public education, public housing, law enforcement, and criminal justice." Rosenheim, Shapiro v. Thompson: "The Beggars Are Coming To Town," 1969 SUP. CT. REV. 303, 335 n.133. One may conjecture that such strains contributed to the near bankruptcy of some urban centers.

John V. Lindsay, former mayor of New York, writes that the federal government must "relieve states and local governments of the fiscal burdens that are brought to their doorsteps by the migrating poor. . . . Urban areas, which have become the repositories of the poorest of the nation's poor, will never be able to deliver essential services . . . as long as they are oppressed by such Federal mandates as welfare and Medicaid." N.Y. Times, Feb. 5, 1981, at A23, col. 5. In *Edwards v. California*, 314 U.S. 160, 173 (1941), Justice Byrnes noted, "The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering." His comment was that "we do not conceive it our function to pass upon 'the wisdom, need or appropriateness' of the legislative efforts of the States to solve such difficulties." *Id.* In fact, however, he was overturning a State effort to deal with the problem because he deemed it "inappropriate," though he sought to clothe his judgment in constitutional terms that repudiated the Court's own utterances going back 100 years.

156. Puerto Rico's Resident Commissioner predicted in Washington that President Reagan's cutbacks "would cause a loss of 30,000 jobs [in Puerto Rico], send a wave of up to 500,000 people to the United States mainland. . . ." N.Y. Times, March 12, 1981, at 1. Most of the migrants would head for New York and Massachusetts.

157. *Buck v. Bell*, 274 U.S. 200, 208 (1927).

158. Packer, *The Aims of the Criminal Law Revisited: A Plea for a New Look at Substantive Due Process*, 44 S.CAL. L. REV. 490, 491-92 (1967).

159. CONG. GLOBE, 39th Cong., 1st Sess. 677 (1866). Such sentiments were summarized in 1872 by "a unanimous Senate Judiciary Committee Report, signed by Senators who had voted for the Thirteenth, Fourteenth, and Fifteenth Amendments in Congress," A. AVINS, *THE RECONSTRUCTION DEBATES* ii (1967). "In construing the Constitution we are compelled to give it such interpretation as will secure the result which was intended . . . by those who framed it and the people who adopted it." *Id.* at 571.

They began with the Civil Rights Bill of 1866, which proceeded on a parallel track with the fourteenth amendment in the 39th Congress. It secured to blacks the *same* right to contract, to hold property, and to sue as whites enjoyed.<sup>160</sup> At that time whites enjoyed no right to support by a sister State. In describing their aims, the framers interchangeably referred to "equality," "equality before the law," and "equal protection," but always in the circumscribed context of the rights enumerated in the Bill, so that it is reasonable to infer that the framers regarded the terms as synonymous.<sup>161</sup> For example, a leading Radical, Samuel Shellabarger of Ohio, said of the Civil Rights Bill, "[W]hatever rights *as to each of these enumerated* civil (not political) matters *the State may confer* upon one race . . . shall be held by all races in equality. . . . It secures . . . *equality of protection in those enumerated* civil rights. . . ."<sup>162</sup> Attempts to abolish *all* distinctions repeatedly were rejected;<sup>163</sup> suffrage and segregation were plainly excluded from the scope of the fourteenth amendment,<sup>164</sup> because as the chairman of the Joint Committee on Reconstruction of both Houses, Senator William Fessenden, explained, "We cannot put into the Constitution, owing to existing prejudices and *existing institutions* [*e.g.*, existing exclusion of migrant paupers], an entire exclusion of all class distinctions."<sup>165</sup> Where terms have been given a meaning in a prior act (the Civil Rights Act) that is *in pari materia*, the Supreme Court has held, that meaning will be given the terms in a later act (the amendment).<sup>166</sup> Bearing in mind that there was not the slightest intimation in the debates that either whites or blacks were entitled to support at the end of their travels and that Stevens' attempt to give the freedmen forty acres in their own States failed, it is sheer fantasy to read into equal protection a migrant's immediate right to support in a sister State.

Even within the framework of the Court's own decisions, *Shapiro*, as Justice Harlan observed, represented "an expansion of the comparatively new constitutional doctrine that some state statutes will be deemed to deny equal protection of the laws unless justified by a 'compelling'" governmental interest, a "doctrine of relatively recent vintage."<sup>167</sup> Prior thereto the rule had been that there is no denial of equal protection if the statute "is rationally related to a legitimate governmental objective."<sup>168</sup> Chief Justice Burger commented that "no state law has ever satisfied this seemingly insurmountable ["compelling"] standard,"<sup>169</sup> a twentieth century Procrustean bed. The

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160. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

161. For citations see R. BERGER, GOVERNMENT BY JUDICIARY 169-71 (1977).

162. CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866) (emphasis added).

163. For citations see R. BERGER, GOVERNMENT BY JUDICIARY 163-64 (1977).

164. *Id.* at 52-68, 117-33. See also Berger, *The Fourteenth Amendment: Light From the Fifteenth*, 74 NW. U.L. REV. 311, 326-31 (1979).

165. CONG. GLOBE, 39th Cong., 1st Sess. 705 (1866).

166. *Reiche v. Smythe*, 80 U.S. (13 Wall.) 162, 165 (1871). See also Taney, C.J., in text accompanying note

87 *supra*. See also note 88 *supra*.

167. *Shapiro v. Thompson*, 394 U.S. 618, 655, 658 (1969) (dissenting opinion).

168. *Id.* at 658.

169. *Dunn v. Blumstein*, 405 U.S. 330, 363-64 (1972) (dissenting opinion).

“compelling state interest” is merely a vehicle for overturning legislation with which the Justices disagree; it is one of what Justices White and Thurgood Marshall describe as “a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause.”<sup>170</sup> That “spectrum” means shifting standards at the service of uncurbed discretion.<sup>171</sup>

#### IV. VOTING AND RESIDENCE RESTRICTIONS

“Every breach of the fundamental laws,” Hamilton observed, “forms a precedent for other breaches,”<sup>172</sup> as the Court demonstrated by quickly extending the “compelling interest” test to overthrow State restrictions on a migrant’s immediate right to vote. State residence restrictions on voting had been “well-established.” By way of explaining article IV, *Blake v. McClung* (1898)<sup>173</sup> stated that a State may “require residence within its limits for a given time before a citizen of another State who becomes a resident thereof shall exercise the right of suffrage. . . .”<sup>174</sup> *Pope v. Williams* (1904)<sup>175</sup> sustained a Maryland requirement of one-year residence for the privilege to vote, and declared that

[t]he privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. . . . In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, . . .

absent discrimination in violation of the federal constitution.<sup>176</sup> As late as 1965, *Carrington v. Rash*<sup>177</sup> cited *Pope* for the proposition that a State has “unquestioned power” to impose reasonable residence restrictions on the right to vote.<sup>178</sup>

A new day dawned in *Dunn v. Blumstein*:<sup>179</sup> “Durational residence laws penalize those persons who have traveled from one place to another,” and the State showed no “compelling reason for imposing durational residence requirements.”<sup>180</sup> Justice Blackmun, on the other hand, contended that “clearly” the “state does have a profound interest in the purity of the ballot box and an informed electorate and is entitled to take appropriate steps to assure those ends.”<sup>181</sup> I would not insist that decisions aged in the wood are to be preferred to those of very recent vintage, but maintain rather that the older

170. *Vlandis v. Kline*, 412 U.S. 441, 458 (1973) (concurring opinion).

171. See Justice Black quotation at text accompanying note 196 *infra*.

172. THE FEDERALIST NO. 25, at 158 (A. Hamilton) (Mod. Lib. ed. 1937).

173. 172 U.S. 299 (1898).

174. *Id.* at 256.

175. 193 U.S. 621 (1904).

176. *Id.* at 632.

177. 380 U.S. 89 (1965).

178. *Id.* at 91. See also *Drueding v. Devlin*, 380 U.S. 125 (1965), *aff'g* 234 F. Supp. 721 (D. Md. 1964) (without opinion); *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *summarily aff'd*, 401 U.S. 985 (1971), *cited in* *Vlandis v. Kline*, 412 U.S. 441, 452 n.9 (1973).

179. 405 U.S. 330 (1972).

180. *Id.* at 334, 335.

181. *Id.* at 362 (concurring opinion).

decisions effectuated the Framers' design, the traditional canon of constitutional construction from which activists now avert their countenances.

To begin with the original Constitution, Justice James Wilson, a leading architect of the Constitution, said in his 1791 Philadelphia Lectures that article I, section 2 "intrusts to . . . the several states, the very important power of ascertaining the qualifications" of the electors.<sup>182</sup> He was well aware, for example, that Connecticut authorized exclusion of freemen "according to the sentiments which others entertain concerning their conversation and behavior . . . a power of a very extraordinary nature,"<sup>183</sup> but notwithstanding bowed to State control. Although the Court based its "one-person-one-vote" rule on the fourteenth amendment, history, as Justice Harlan justly maintained, is "irrefutably" to the contrary,<sup>184</sup> as a few facts out of many speedily show. Between 1865 and 1868, "17 or 19" Northern States had rejected suffrage for blacks.<sup>185</sup> Consequently, Roscoe Conkling, a member of the Joint Committee on Reconstruction, which drafted the amendment, stated that it would be "futile to ask three quarters of the States to do . . . the very thing most of them have already refused to do. . . ."<sup>186</sup> Another member of the Committee, Senator Jacob Howard, spoke to the same effect.<sup>187</sup> Senator Fessenden, Chairman of the Joint Committee, said of a suffrage proposal that there is not "the slightest possibility that it will be adopted by the States. . . ."<sup>188</sup> The Report of the Joint Committee doubted that "the States would consent to surrender a power they had exercised, and to which they

182. 1 JAMES WILSON, WORKS 407 (R. McCloskey ed. 1967).

183. *Id.* at 409. Although *Federalist No. 52* noted that the "definition of the right of suffrage is very justly regarded as a fundamental article of republican government . . .," it concluded that the right must be left to the States because "the different qualifications in the different States [could not be reduced] to one uniform rule." THE FEDERALIST NO. 52, at 341-42 (A. Hamilton or J. Madison) (Mod. Lib. ed. 1937). And alluding to the allocation of representatives according to the numbers of inhabitants, *Federalist No. 54* added that "the right of choosing this allotted number in each State is to be exercised by such part of the inhabitants as the State itself may designate. . . . In every State, a certain proportion of inhabitants are deprived of this right by the constitution of the State." THE FEDERALIST NO. 54, at 356 (A. Hamilton) (Mod. Lib. ed. 1937).

184. *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment): the reapportionment interpretations were "made in the face of irrefutable and still unanswered history to the contrary."

185. *Oregon v. Mitchell*, 400 U.S. 112, 256 (1970) (Brennan, White & Marshall, JJ., dissenting in part).

186. CONG. GLOBE, 39th Cong., 1st Sess. 358 (1866).

187. *Id.* at 2766. Another member of the Joint Committee, Senator George W. Williams of Oregon, stated: [T]he people of these United States are not prepared to surrender to Congress the absolute right to determine as to the qualifications of voters in the respective States, or to adopt the proposition that all persons, without distinction of race or color, shall enjoy political rights and privileges equal to those now possessed by the white people of the country. Sir, some of the States have lately spoken upon that subject. Wisconsin and Connecticut, northern, loyal, and republican States, have recently declared that they would not allow the negroes within their own borders political rights; and is it probable that of the thirty-six States more than six, at the most, would at this time adopt the constitutional amendment proposed by the gentleman? . . . Put it before the country and commit the Union party to it, the amendment will be defeated and the Union party overwhelmed in its support—and the control of the government would pass into the hands of men who have more or less sympathized with the rebellion; and I say that it is of more consequence, in my judgment, that the control of the Government should remain in the hands of the men who stood up for the Union during the late war than that any constitutional amendment should be adopted by which the right of suffrage should be extended to any person or persons not now enjoying it.

CONG. GLOBE, 39th Cong., 1st Sess. S. App. 95-96 (1866).

188. *Id.* at 704. For additional citations, see R. BERGER, GOVERNMENT BY JUDICIARY 58-60 (1977).

were attached," and therefore thought it best to "leave the whole question with the people of each State."<sup>189</sup> That such was the vastly preponderant opinion is confirmed by a remarkable fact: during the pendency of ratification, radical opposition to readmission of Tennessee because its Constitution excluded Negro suffrage was voted down in the House by 125 to 12; Senator Charles Sumner's related proposal was rejected by 34 to 4.<sup>190</sup> A bevy of activist commentators concur that suffrage was excluded.<sup>191</sup> Former Solicitor General Robert Bork sums up: "Chief Justice Warren's opinions in [the state reapportionment] cases are remarkable for their inability to muster a single respectable supporting argument. The principle of one man, one vote . . . runs counter to the text of the fourteenth amendment, the history surrounding its adoption and ratification and the political practice of Americans from colonial times up to the day the Court invented the new formula."<sup>192</sup> Warren's "legislators represent people, not trees or acres"<sup>193</sup> substitutes rhetoric for adverse historical fact. By comparison with judicial arrogation of control over reapportionment, the annulment of State residence requirements for voting is innocuous. History even more deeply etches the States' reserved power over suffrage than over exclusion of indigent migrants, so that *Dunn v. Blumstein* illustrates afresh that power grows by what it feeds on.

Let me call to witness the whilom idol of the activists, Justice Black. In overruling *Bradlove v. Suttle*<sup>194</sup> (poll taxes are valid), the Court, he stated, did not proceed from "the original meaning of the Equal Protection Clause" but gave it "a new meaning which it believes represents a better governmental policy."<sup>195</sup> He condemned use of the due process clause as

189. Reprinted in A. AVINS, *THE RECONSTRUCTION AMENDMENTS DEBATES* 94 (1967).

190. For details see R. BERGER, *GOVERNMENT BY JUDICIARY* 56, 59-60, 79 (1977). Little wonder that a dyed-in-the-wool activist, Justice Thurgood Marshall, asked in a moment of truth: "I would like to know where the Constitution guarantees . . . the right to vote." *Vlandis v. Kline*, 412 U.S. 441, 458 (1973) (dissenting opinion).

191. Lusky, Book Review, 6 *HASTINGS CONST. L.Q.* 403, 406 (1979), refers to "Justice Harlan's irrefutable and unrefuted demonstration in dissent that the Fourteenth Amendment was not intended to protect the right to vote. . . ." See also Abraham, Book Review, 6 *HASTINGS CONST. L.Q.* 467, 467-68 (1979); Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation*, 5 *HASTINGS CONST. L.Q.* 603, 622 (1978); Mendelson, Book Review, 6 *HASTINGS CONST. L.Q.* 437, 452-53 (1979); Nathanson, Book Review, 56 *TEX. L. REV.* 579, 581 (1978); Perry, Book Review, 78 *COLUM. L. REV.* 685, 687 (1978).

Professor Gerald Gunther wrote, "The ultimate justification for the [*Reynolds v. Sims*, 377 U.S. 533 (1964)] ruling is hard, if not impossible, to set forth in constitutionally legitimate terms. It rests, rather, on the view that courts are authorized to step in when injustices exist and other institutions fail to act. That is a dangerous—and I think illegitimate—prescription for judicial action." Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots and Prospects*, 1979 *WASH. U.L.Q.* 817, 825.

192. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 18 (1971). Ward Elliot justly stated that in *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court fabricated a "fundamental principle of 'one person, one vote' that was exactly the reverse of the text and stated intent of the equal protection clause." W. ELLIOT, *THE RISE OF A GUARDIAN DEMOCRACY* 129 (1974).

193. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Justice Harlan justifiably charged in *Carrington v. Rash*, 380 U.S. 89, 97 (1965) (dissenting opinion), that "the Court totally ignores . . . all the history of the Fourteenth Amendment and the course of judicial decisions which together plainly show that the Equal Protection Clause was not intended to touch State electoral matters."

194. 302 U.S. 277 (1937).

195. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 672 (1966).

though it provided a blank check to alter the meaning of the Constitution as written so as to add to it substantive constitutional changes which a majority of the Court at any given time believes are needed to meet present day problems. . . . If basic changes as to the respective powers of the State and national governments are needed, I prefer to let these changes be by amendment as Article V of the Constitution provides. For a majority of this Court to undertake that task, whether purporting to do so under the Due Process or on the Equal Protection Clause amounts, in my judgment, to an exercise of power the Constitution makers with foresight and wisdom refused to give the Judicial Branch of the Government.<sup>196</sup>

## V. CONCLUSION

The source of the constitutional right to travel has unnecessarily been wrapped in "uncertainty," for the Founders considered that the "privileges and immunities" of article IV embraced "ingress and egress," as is indeed implicit in its text. How else can a citizen of one State enjoy the privileges of a sister State? But that right was qualified by the States' reserved right to exclude indigent migrants, a reservation expressly written into the antecedent "privileges and immunities" of the Articles of Confederation, giving effect to centuries of English, colonial and State law and custom. If the legislation of more than forty States may serve as an index, it continued to represent the will of the American people until it was overthrown by *Shapiro v. Thompson*. Be it assumed that it is mean and inhumane, as Professor Rosenheim labelled it, to condition relief to migrants on one-year residence, the Court is not empowered to supplant the morality of the people by its own.<sup>197</sup>

Although this is a thrice-told tale, federal Judge Irving R. Kaufman still incants exploded clichés: "We are not the arbiters of what, in our view, should be. We are the interpreters of what is. . . . When faced with a contrary legal mandate, a judge has no choice but to put aside his personal policy preferences."<sup>198</sup> Contemporary academicians are less naive. Professor Robert

196. *Id.* at 675-76. Similarly, Justice Harlan declared, "When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect." *Oregon v. Mitchell*, 400 U.S. 112, 203 (1970) (concurring and dissenting in part).

197. Crane Brinton wrote of Robespierre, "If Frenchmen would not be free and virtuous voluntarily then he would force them to be free and cram virtue down their throats." 2 C. BRINTON, S. CHRISTOPHER & R. WOLFF, *A HISTORY OF CIVILIZATION* 115 (1955). W.H. Auden noted that "under the Protectorate, Englishmen learned that the dangers of arbitrary power were not necessarily removed simply by the abolition of the Crown, for the claims of self-appointed saints to know by divine inspiration what the good life should be and to have the right to impose their notions on the ungodly could be as great a threat as the divine right of kings." Auden, *Introduction to THE SELECTED WRITINGS OF SIDNEY SMITH* at xvi (1956).

Presumably awareness of such historical experience inspired Justice Holmes to advise Justice Harlan Stone: "Young man about 75 years ago I learned that I was not God. And so, when the people . . . want to do something I can't find anything in the Constitution expressly forbidding them to do, I say, whether I like it or not, 'Goddamit, let 'em do it.'" C. CURTIS, *LIONS UNDER THE THRONE* 281 (1947). In stark contrast stands the eagerness of contemporary activist Justices—our "self-appointed saints"—to "cram" their moral sentiments "down the throats" of the American people. See R. BERGER, *GOVERNMENT BY JUDICIARY* 328 n.56 (1977).

198. N.Y. Times, Jan. 24, 1981, at 23, col. 6. For a more realistic appraisal, see the dissent of four of his brethren in *Turpin v. Mailet*, 579 F.2d 152, 171 (1978) (dissenting opinion by Circuit Judge Van Graafeiland). Contrast with Judge Kaufman's the following comment on *Dunn v. Blumstein* by Professor Philip Kurland:



Cover thrusts aside "the self-evident meaning of the Constitution," let alone "the intentions of the framers," explaining that the Constitution is of no moment because "we" have decided to "entrust" judges with forming an "ideology" whereby legislation may be measured, and it may be added, the Framers' choices discarded.<sup>199</sup> Of course, Cover does not tell us where the *people* "entrusted" such power to judges; it is simply a grant by academic illuminati. Professor Paul Brest lets the cat out of the bag, challenging the "assumption" that "judges and other public officials are bound by the text or original understanding of the Constitution."<sup>200</sup> Why should the people be more bound by the Constitution than the judges, who have sworn "to support this Constitution"?

It is the purpose of this Article, one of a number of other case studies,<sup>201</sup> to flesh out what Professor Philip Kurland described as "the usurpation by the judiciary of general governmental powers on the pretext that its authority derives from the fourteenth amendment."<sup>202</sup> Only when the people understand that it is the Justices, not the Constitution,<sup>203</sup> that require bussing, affirmative action and the like will they be moved to reassert their right to self-government.

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The judgment was based on the invocation of two slogans as though they were reasons: "the right to travel" was one and the "lack of a compelling state interest to overcome a suspect classification" was the other. A "compelling state interest" like "a suspect classification" and "the right to travel" remain subjective determinations dependent on the personal proclivities of each of the Justices.

....

The transmogrification of welfare from a concept of charity to one of constitutional right received a strong push in *Shapiro v. Thompson*. . . .

Kurland, *1971 Term: The Year of the Stewart-White Court*, 1972 SUP. CT. REV. 181, 206, 255.

199. Cover, Book Review, THE NEW REPUBLIC, Jan. 14, 1978, at 26, 27.

200. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 224 (1980); see also Forrester, *Are We Ready For Truth in Judging?*, 63 A.B.A.J. 1212 (1977).

201. Elsewhere I demonstrated that the Court read suffrage and desegregation of schools into the fourteenth amendment, notwithstanding their having been excluded by the framers, R. BERGER, GOVERNMENT BY JUDICIARY 52-68, 117-133 (1977); that it converted the prohibition of Bills of Attainder—confessedly associated at the adoption of the Constitution with legislative condemnations to death, Berger, *Bills of Attainder: A Study of Amendment by the Court*, 63 CORNELL L. REV. 355 (1978)—to strike down noncapital, even civil, "penalties." Similarly I examined the Court's six-man jury decision which toppled the twelve-man jury "sacred" to the Founders and considered by them to be a central pillar of their democratic edifice. R. BERGER, GOVERNMENT BY JUDICIARY 397, 399-400 (1977). Soon, however, the Court decreed that a five-man jury is unconstitutional, on the ground, three Justices considered, that "a line has to be drawn somewhere." *Ballew v. Georgia*, 435 U.S. 223, 239, 246 (1978). Why could it not be drawn where the Framers reverently left it? To an irreverent observer there is a striking similarity to George Orwell's ANIMAL FARM 47 (1946), where the sheep were taught to bleat: "Four legs good, two legs bad."

202. Letter to Harvard University Press, August 15, 1977. See also Gunther quotation, note 191 *supra*.

203. At the height of the Court Packing campaign Professor Felix Frankfurter advised President Roosevelt: People have been taught to believe that when the Supreme Court speaks it is not they who speak but the Constitution, whereas, of course, in so many vital cases, it is *they* who speak and *not* the Constitution. And I verily believe that that is what the country needs most to understand.

ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945, at 383 (M. Freedman ed. 1967).

